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No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

IN RE EDWARD W.W. HOWELL,
d/b/a HOWELL ELECTRIC COMPANY,
Debtor.

EDWARD W.W. HOWELL,
d/b/a HOWELL ELECTRIC COMPANY,
Petitioner,

v.

THE STATE BOARD OF EQUALIZATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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September 4, 1984

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QUESTION PRESENTED

1. Whether the legal incidence of the California Sales and Use Tax falls upon the United States in violation of the Supremacy Clause of the United States Constitution, Article VI, Clause 2, when a federal contractor is assessed a use tax on personal property, the legal title to which passed to the United States prior to use by that contractor.

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v.

THE STATE BOARD OF EQUALIZATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner Edward W. W. Howell, d/b/a Howell Electric Company ("Howell"), respectfully prays that a writ of certiorari issue to review the judgment and opinion entered by the United States Court of Appeals for the Ninth Circuit on April 19, 1984.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (Pet. App. A, pp. 1a-8a *infra*) is reported at 731 F.2d 624. The opinion of the United States District Court for the Northern District of California, as modified by its order of June 17, 1983 (Pet. App. B, pp. 1b-7b *infra*), was not officially

reported. The opinion of the United States Bankruptcy Court, Northern District of California (Pet. App. C, pp. 1c-8c *infra*), was also not officially reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. D, p. 1d *infra*) was entered on April 19, 1984. A timely petition for rehearing and suggestion for rehearing *en banc* was denied by an order dated June 4, 1984 (Pet. App. D, p. 2d *infra*). This Court's jurisdiction to review the judgment below is invoked under 28 U.S.C. § 1254(1) (1982).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article VI, Clause 2 of the United States Constitution provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Section 6006(a) of the California Revenue and Taxation Code,[1] in relevant part, provides:

> **§ 6006. "Sale"**
>
> "Sale" means and includes:
>
> (a) Any transfer of title or possession, exchange or barter, conditional or otherwise, in any manner or by any means whatsoever, of tangible personal property for a consideration. "Transfer of possession," includes only transactions found by the

[1] All statutes referred to are located in *Deering's Annotated California Code*.

board [the California State Board of Equalization] to be in lieu of a transfer of title, exchange, or barter.

* * * *

Section 6007 of the California Revenue and Taxation Code, in relevant part, provides:

§ 6007. "Retail sale": "Sale at retail"

A "retail sale" or "sale at retail" means a sale for any purpose other than resale in the regular course of business in the form of tangible personal property.

* * * *

Section 6007.5 of the California Revenue and Taxation Code provides:

§ 6007.5. Sale of tangible personal property to contractor for use in performance of contracts with United States: Gross receipts included

A sale of tangible personal property to a contractor or subcontractor for use in the performance of contracts with the United States for the construction of improvements on or to real property in this State is a retail sale. The gross receipts from such a sale or the sales price of property so sold shall be included in the measure of the taxes imposed by this part.

Section 6009 of the California Revenue and Taxation Code provides:

§ 6009. "Use"

"Use" includes the exercise of any right or power over tangible personal property incident to the ownership of that property, and also includes the possession of, or the exercise of any right or power over, tangible personal property by a lessee under a lease, except that it does not include the sale of that property in the regular course of business.

Section 6381 of the California Revenue and Taxation Code provides:

> **§ 6381. Sales to the United States or its agencies: Sales to Red Cross**
>
> There are exempted from the computation of the amount of the sales tax the gross receipts from the sale of any tangible personal property to:
>
> (a) The United States, its unincorporated agencies and instrumentalities;
>
> (b) Any incorporated agency or instrumentality of the United States wholly owned by the United States or by a corporation wholly owned by the United States;
>
> (c) The American National Red Cross, its chapters and branches.
>
> This exemption does not extend to the rentals payable under a lease of tangible personal property.

Section 6384 of the California Revenue and Taxation Code provides:

> **§ 6384. Materials purchased for use in performance of contracts with United States**
>
> Notwithstanding any other provision of law the tax imposed under this part shall apply to the gross receipts from the sale of any tangible personal property to contractors purchasing such property either as the agents of the United States or for their own account and subsequent resale to the United States for use in the performance of contracts with the United States for the construction of improvements on or to real property in this State.

STATEMENT OF THE CASE

The decision of the United States Court of Appeals for the Ninth Circuit misapplies this Court's recent decision in *Washington* v. *United States*, 103 S. Ct. 1344 (1983). In particular, the court of appeals [2] badly confuses the issue of whether the California Sales and Use Tax "is discriminatory with regard to the economic burdens that resul[ ]" [3] with the issue that is the principal subject of this action: Whether California, by purporting to levy a use tax on Howell, is in reality imposing a use tax directly on the United States.

California's sales tax is accompanied by a use tax. The use tax is imposed upon the user of tangible personal property at the same rate as the sales tax, but *only* when that use is incident to legal ownership of that property. California's use tax is thus a title-based use tax; it is not—as some other states have—a possessory use tax. *Compare United States* v. *Boyd*, 378 U.S. 39, 40 (1964) (Tennessee's tax "imposes a tax upon contractors using property in the performance of their contracts with others, irrespective of the ownership of the property. . . ."), *with* CAL. REV. & TAX. CODE § 6009 (Deering 1975) (use defined as "exercise of any right or power over tangible personal property incident to the ownership of that property").[4]

The circuit court below held that California can tax the United States, and thus evade the constitutional immunity of the United States from state taxation, by levying a use tax on Howell, a government contractor. As detailed below, legal title to the personal property had vested in the United States prior to use by Howell. Accordingly, Howell had possession but not legal title to personal property used for the improvement of real property owned by the United States.

In reaching its decision, the Ninth Circuit totally confuses this Court's "direct tax" cases with its "discrimination" line of

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[2] Howell v. State Board of Equalization (In re Howell), 731 F.2d 624 (9th Cir. 1984).

[3] Washington v. United States, 103 S. Ct. at 1349.

[4] *See also Prentice-Hall All States Tax Guide* at ¶ 5003 (1977 ed.) ("*Use taxes are imposed on the privilege of ownership or possession*, storage, use or consumption of goods in the state.") (emphasis added).

opinions. The court of appeals also ignores the fundamental distinction between California's sales tax and its complementary use tax, the tax being applied to Howell here. In this regard, the court fails to deal with—or even acknowledge—the holdings of other courts that, when the United States becomes the owner of personal property under a title-based use tax like California's, the Supremacy Clause of the United States Constitution precludes application of the use tax to a government contractor.

1. The California Sales And Use Tax Scheme

California is one of many states that have a complementary sales and use tax system. Sales and use taxes can be either vendor or vendee taxes. A vendor type tax means that the seller is required to pay the tax to the state; a vendee type tax means that, although the seller is required to pay the tax to the state—just as in the case of vendor type tax—the seller is statutorily entitled to reimbursement of that tax from the buyer.

Although California has characterized its tax as a vendor type tax, this Court has found that, as a matter of federal law, the legal incidence of the tax falls upon the purchaser and not upon the vendor. *See, e.g., Diamond National Corp.* v. *State Board of Equalization,* 425 U.S. 268 (1976) (holding "that the incidence of the [California] state and local sales taxes falls upon the national bank as purchaser and not upon the vendors"); *United States* v. *California State Board of Equalization,* 650 F.2d 1127, 1132 (9th Cir. 1981), *aff'd per curiam,* 456 U.S. 901 (1982) (affirming the Ninth Circuit's holding that "the California sales tax scheme manifests a legislative intent that the lessee pay the sales tax"). *See also United States* v. *State Board of Equalization,* 536 F.2d 294 (9th Cir. 1976) (holding that the legal incidence of the California sales tax falls on the United States as lessee, rather than on the lessor).

The difference between the two types of sales and use taxes becomes critical when sales to the United States are involved. The legal incidence of a vendor type tax falls on the seller and is constitutionally permissible; the legal incidence of a vendee type tax falls on the United States and is not. *See, e.g., United States* v. *State Board of Equalization,* 536 F.2d at 295; *United*

States v. *California State Board of Equalization,* 650 F.2d at 1131-32.

As noted, the California sales and use taxes complement each other. The California sales tax is imposed on the retailer (seller) of personal property measured by a percentage of the gross receipts; the use tax is imposed on the user (normally, the buyer) at the same rate as the sales tax. The use tax applies *unless* the retailer pays the sales tax in connection with the sale of that personal property. Thus, the use tax affords a mechanism for collection from the buyer.

California Revenue and Taxation Code section 6051 [5] imposes a sales tax, computed as a percentage of gross receipts, upon all retailers for the privilege of selling tangible personal property at retail. A sale is defined by section 6006 as: "(a) Any transfer of title or possession . . . of tangible personal property for a consideration" and "(f) A transfer for a consideration of the title or possession of tangible personal property which has been produced, fabricated, or printed to the special order of the customer. . . ."

Section 6007, in turn, defines a retail sale as "a sale for any purpose *other* than resale in the regular course of business. . . ." (emphasis added). Thus, a sale for resale does not constitute a sale for purposes of the California sales tax. And a purchaser can relieve the seller from liability for sales tax by giving the seller a resale certificate indicating that the personal property is to be resold by the purchaser. *See* CAL. REV. & TAX. CODE §§ 6092-6094 (Deering 1975).

There are three sections of the California Revenue and Taxation Code which pertain specifically to United States contractors. Section 6381 exempts from the computation of the tax the gross receipts from the sale of any tangible personal property to the United States. Section 6007.5 defines the sale of tangible personal property to a federal contractor "for the construction of improvements on or to real property" in California as a retail sale. And section 6384 subjects a government

[5] Unless otherwise indicated, all statutory references herein are to the California Revenue and Taxation Code.

contractor to the sales tax regardless of whether the contractor is acting as an agent of the United States or is purchasing the personal property for "subsequent resale to the United States. . . ."

It must be recognized that section 6381, which strictly prohibits taxing the sale of personal property to the United States, is a significant overriding factor in the California taxation scheme. Thus, in order to avoid directly taxing the United States, sections 6007.5 and 6384 move the taxable transaction one step up the chain of sale: These two sections tax the transaction between the supplier and the government contractor as a retail sale. [6] In particular, section 6007.5 purports to tax the supplier irrespective of whether, as with Howell's transactions, the federal contractor issues a resale certificate.

Here, the Board—for unknown reasons—has determined not to follow its own statutes and impose a sales tax on Howell's suppliers under section 6007.5. Under these circumstances, if Howell is to be taxed at all, it must, as clearly recognized by the California State Board of Equalization ("the Board"), [7] be through application of the use tax.

Therefore, as noted above, the California Revenue and Taxation Code provides an alternative basis for taxation: an

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[6] While the statutory authority for its enactment is unclear, Sales and Use Tax Regulation No. 1521 classifies federal contractors as *consumers* of materials and fixtures, but private contractors are treated as *retailers* of materials and fixtures. *See* CAL. ADMIN. CODE tit. 18, R.1521 (1980). However, even though certain professions are specifically deemed "consumers" under the California Revenue and Taxation Code, government contractors are not. *Compare* Washington v. United States, 103 S. Ct. at 1347 n.3 (federal contractors taxed as consumers pursuant to *statute*). Regulation No. 1521 thus appears to be an attempt by the Board to shift the legal incidence of the California tax from the United States to private contractors. Yet such an enlargement of the California tax statutes is strictly prohibited. *See* CAL. GOV'T CODE § 11342.2 (Deering 1982).

[7] Brief of Appellee State Board of Equalization at 3, Howell v. State Board of Equalization (In re Howell), 731 F.2d 624 (9th Cir. 1984) ("The asserted deficiency relates to use taxes alleged to be due on the items so purchased."). *See also* Stipulation Of Facts at ¶¶ 1, 9 (filed with the United States Bankruptcy Court, Northern District of California, August 20, 1980) ("Stipulation Of Facts at ¶ ___"). The Stipulation Of Facts, and the exhibits thereto, are included in the record below.

excise use tax on property purchased for a purpose *other* than resale in the regular course of business. Specifically, section 6201 imposes an excise tax "on the storage, use, or other consumption in this state of tangible personal property purchased from any retailer. . . ." And under section 6202, every person "storing, using, or otherwise consuming in this State tangible personal property purchased from a retailer is liable" for the use tax.

Section 6008 defines storage as including the "keeping or retention in this State for any purpose *except sale in the regular course of business* . . . of tangible personal property purchased from a retailer." (emphasis added). Use of personal property is defined by section 6009 as including "the exercise of any right or power over tangible personal property *incident to the ownership* of that property . . . except that it does *not include the sale of that property in the regular course of business.*" (emphasis added). No definition of consumption is provided within the statutory scheme.

The legally-questionable application of the use tax arises in situations where, as here, the federal government is the recipient of legal title to property—either under the terms of a government contract or by California law—and any use of the property by the contractor in performing that contract is made strictly on behalf of the United States.

In this regard, it is well settled in California that, in order for the use tax to apply, whatever use (including storage) is made of the personal property must occur while the purchaser is the owner of legal title. This is because taxable use, by definition, is that use "incident . . . to ownership. *See* CAL. REV. & TAX. CODE § 6009 (Deering 1975). This basic principle is fully consistent with decisions of California courts interpreting the application of California's use tax. *See, e.g., Lockheed Aircraft Corp.* v. *State Board of Equalization,* 81 Cal. App.3d 257, 272, 146 Cal. Rptr. 283, 292 (1978) ("whatever use (including storage) is made of the property must occur while the purchaser is owner since the taxable use is incident to ownership"). *Union Oil Co.* v. *State Board of Equalization,* 34 Cal. Rptr. 872, 876, 386 P.2d 496, 500 (1963) (holding that use

tax could properly be imposed on lessor of personal property since leasing personal property is incident to the ownership of that property). *See also Levine* v. *State Board of Equalization,* 142 Cal. App.2d 760, 766, 299 P.2d 738, 744 (1956); *General Electric Co.* v. *State Board of Equalization,* 111 Cal. App.2d 180, 184, 244 P.2d 427, 429 (1952).

2. Howell's Contracts With The United States

Howell is an electrical contractor who performs a substantial portion of its business for agencies of the United States Government. In this connection, Howell operates as both a prime and a subcontractor for the improvement of real property belonging to the United States. With respect to the contracts at issue here, Howell acted as a subcontractor on thirteen projects and as a prime contractor on two projects. Stipulation Of Facts at ¶ 4.

In performing these contracts, Howell purchased tangible personal property from suppliers tax-free ("ex tax")—that is, Howell's suppliers did not pay any sales tax. This is because under the California Sales and Use Tax, Howell issued a resale certificate to each supplier, indicating that Howell would be reselling the property to the United States. *See* CAL. REV. & TAX. CODE Tax. Code §§ 6092-6094 (Deering 1975). *See also Stipulation Of Facts at* ¶ 1. As noted above, however, the Board *could* have imposed a sales tax on Howell's suppliers under section 6007.5—despite Howell's issuance of resale certificates.

The Stipulation Of Facts entered into by the parties in the bankruptcy proceeding below describes in detail the contractual provisions for ownership of the tangible personal property involved in each contract, as well as the federal government's complete control over Howell's activities as a contractor. Specifically, the United States acquired title to the personal property installed by Howell at the *earliest* of two dates: (i) pursuant to the contractual provisions,[8] when the Government made its

[8] *See, e.g.,* Stipulation Of Facts at ¶ 15, and Exhibit C. *See also* Contract No. IFB N62474-76-B-7658 at ¶ 7(d) ("Job No. 101"). As noted directly above, all of Howell's contracts with the United States, including Job 101, are referenced in the Stipulation Of Facts.

initial progress payment, or (ii) by law,[9] when Howell first attached the personal property to the Government's real property.

Typically, the general provisions of the government contracts involved herein provide that the United States will make progress payments monthly as work proceeds, or at more frequent intervals. *See* Job No. 101 at ¶ 7(b). And all material and work covered by progress payments immediately becomes the sole property of the United States. *Id.* at ¶ 7(d). *See also* Stipulation Of Facts at Exhibit C.

Regardless of the precise time when title vested in the United States, one point remains clear: Title vested well before use by Howell. Indeed, it should be noted that, with respect to three of the contracts at issue, Howell did not even install the personal property that it had purchased from suppliers. *See* Stipulation Of Facts at ¶ 15. Rather, Howell simply transferred that property to a prime contractor, and the prime contractor installed the materials for the project owner, the United States.

In general, the government contracts also contemplated that the United States would carefully monitor Howell's performance as both a prime and a subcontractor. For example, before Howell could purchase personal property from its suppliers, the United States had to give Howell, or Howell's prime contractor, formal approval. *See, e.g.,* Job No. 101 at ¶ 9. This was to ensure that the materials purchased by Howell fully conformed to U.S. Government specifications. In addition, the federal Contracting Officer had the right to inspect, on a regular basis, all work being performed by Howell. *Id.* at ¶ 10. Finally, as owner of the tangible personal property in Howell's possession, the federal government was of course entitled to remove the equipment at any time during the contract and to direct its further use or sale after completion of the contract. *See generally* Job No. 101 at ¶ 16. In short, the government contracts clearly indicate that the United States regarded itself as the purchaser and owner of all personal property used by Howell.

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[9] *See, e.g.,* General Electric Co. v. State Board of Equalization, 244 P.2d at 430 (title to generator passed when affixed to real property).

Howell's use was merely to accomplish the purpose of the owner: the improvement of property for the Government.

3. Proceedings In The Bankruptcy Court

On February 12, 1979, Howell filed a petition for reorganization under Chapter XI of the Bankruptcy Act of 1978, 11 U.S.C. §§ 1101-1174 (1982).[10] On June 27, 1979, the California State Board of Equalization filed a Proof of Priority Claim for Taxes in the bankruptcy proceeding. The Claim alleged a deficiency under the California Sales and Use Tax Law in the amount of $71,502.34 plus interest for the audit period April 1, 1976 through February 12, 1979. It has never been in dispute that the claimed deficiency concerns *use* taxes assessed on personal property purchased by Howell ex-tax from various suppliers under resale certificates. *See, e.g.,* Stipulation Of Facts at ¶¶ 1, 9.

On April 21, 1980, Howell filed an objection to the Board's Claim and a trial was conducted before the United States Bankruptcy Court, Northern District of California, on August 26, 1980. On September 23, 1981, the Bankruptcy Court entered a Ruling disallowing the Board's claim. *See* Pet. App. C, pp. 1c-8c *infra.* While the Bankruptcy Court disallowed the Board's Claim on the principal ground that California's taxing scheme impermissibly discriminates against government contractors,[11] Howell had also contended that the California tax imposes a direct tax upon the United States in violation of the Supremacy Clause of the United States Constitution. *See* Pet App. A, p. 3a n.1 *infra.*

4. The Decision Of The U.S. District Court

The Board appealed the Bankruptcy Court's Ruling to the

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[10] The United States Bankruptcy Court, Northern District of California, is expected to enter a final order terminating the bankruptcy proceeding in September 1984. After entry of this order, Howell will no longer be conducting its business under Chapter XI.

[11] In reaching its decision, the Bankruptcy Court had relied upon the Ninth Circuit's decision in Washington v. United States, 654 F.2d 570 (9th Cir. 1981)—a decision subsequently overturned by this Court in 1983. *See* 103 S. Ct. at 1344.

U.S. District Court for the Northern District of California. The district court, relying substantially on this Court's recent decision in *Washington* v. *United States,* entered a Memorandum and Order on May 26, 1983.[12] The Order reversed the Bankruptcy Court's Ruling and remanded the case for further proceedings consistent with its opinion. *See* Pet. App. B, p. 6b *infra.*

In its decision, the district court held that the California Sales and Use Tax scheme does not unconstitutionally discriminate between federal and non-federal contractors. Notably, the district court's opinion did not address the issue of whether the California tax impermissibly levies a direct use tax upon the United States.

5. The Decision Of The Court Of Appeals

On April 19, 1984, the U.S. Court of Appeals for the Ninth Circuit affirmed the decision of the district court. Pet. App. A, pp. la-7a *infra.* Howell's petition for rehearing and suggestion for rehearing *en banc* was denied by order dated June 4, 1984. Pet. App. D, p. 2d *infra.*

The court of appeals stated at the outset that the issue presented for review is "the constitutionality of the California Sales and Use Tax as applied to federal contractors . . . ." Pet. App. A, p. 4a *infra.* In this regard, the Court's decision on the merits concentrated on whether California had imposed a direct tax upon the United States Government.[13]

The court based its decision that California had not directly taxed the United States on the sole ground that "the tax is imposed on the transfer of property from a supplier to Howell." Pet. App. A, p. 6a *infra.* But this would seem to describe the imposition of a *sales* tax—not a use tax.

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[12] The decision was modified by Order dated June 17, 1983. Pet. App. B, p. 7b *infra.*

[13] The court of appeals also briefly considered two other issues: (i) whether the Board had statutory authority under the California Revenue and Taxation Code to treat federal contractors as consumers of materials and fixtures, and (ii) whether the Board had a rational basis for distinguishing between U.S. contractors who make improvements to real property and those who simply transfer personal property to the United States without attaching it to realty. Neither of these issues is the subject of this Petition.

In reaching this result, the Ninth Circuit did not address how the Board could levy a use tax on Howell under circumstances where the United States owned the personal property at issue, and where the use of that property could only have been on behalf of the United States. The court's holding, as well as every intermediate step in the court's analysis, followed directly from its initial premise that:

> The Supreme Court implicitly approved the constitutionality of a federal contractor "passing on" the tax to the United States in the reasoning in *Washington* ... . and has expressly upheld its constitutionality in many cases.

Id. at p. 5a *infra* (citation omitted). The court of appeals' opinion thus clearly permits California to levy a use tax on federal contractors—even in circumstances where, as here, the contractor did not have legal title to the personal property and, by definition, any use of property of the United States was exclusively on behalf of the United States.

REASONS FOR GRANTING THE WRIT

This case provides unique and compelling circumstances that necessitate the exercise of the Court's jurisdiction.

First, the court of appeals totally failed to recognize that, as a result of the operation of California's title-based use tax statutes, the legal incidence of the tax falls directly upon the United States as the purchaser and *owner* of the personal property at issue—not upon Howell, the government contractor. In this connection, the Ninth Circuit mistakenly relies on certain decisions of this Court regarding the taxation of federal contractors in states where possessory use taxes, as opposed to title-based use taxes, were in effect. This distinction is critical since it is constitutionally permissible to assess a possessory use tax on a federal contractor. However, it is unconstitutional for California to levy a title-based use tax with respect to personal property that belongs to the United States. It is, of course, so well settled as to be hornbook law that, when the legal incidence of a tax falls upon the United States, that tax

violates the United States' constitutional immunity from state taxation. *See* U.S. CONST. art. VI, cl. 2. Yet, when faced with California's attempt to slide by that basic principle of constitutional law, the court of appeals dismissed that rule with the airy conclusion that the tax could not be upon the United States because "the tax is imposed [by California] on the transfer of property from a supplier to Howell." *See* Pet. App. A, p. 6a *infra*. In reaching this conclusion, the Ninth Circuit completely misunderstands the transaction being taxed. It apparently believed that a *sales* tax was imposed on the sale of personal property from suppliers to Howell. However, even the Board acknowledges that it did not follow California's own statutory scheme by levying a sales tax on Howell's suppliers. Instead, the Board is attempting to impose a use tax on property owned by the United States. Such an application of California's use tax is a tax on the Government itself.

Second, the Ninth Circuit's decision is directly inconsistent with an earlier decision by that same court. Moreover, the court's decision in *Howell* undercuts a decision by the U.S. Court of Appeals for the First Circuit. As a result of the conflict of opinions within the Ninth Circuit, as well as between the Ninth and First Circuits, there is immediate confusion and chaos. Federal contractors are now uncertain as to whether a use tax can be applied to personal property purchased from a supplier for resale to the United States—even in circumstances where the federal contractor has no legal title to the property and the United States has the sole right to direct the use and disposition of that property.

Third, this is not a situation where application of the California Sales and Use Tax to federal contractors controls only a single case. Ordinarily, this Court is justifiably reluctant to consider and determine the validity of a state tax issue as to which the federal courts cannot always have the last word. The court of appeals' decision in this case, however, will not just affect this lawsuit, but will directly control the manner in which thousands of federal contractors are able to allocate costs and bid for, as well as perform, government contracts in states that have title-based use taxes.

1. Under California's Tax Scheme, The Board's Taxation Of Government-Owned Property In Howell's Possession Is A Direct Tax On The United States.

In reaching its decision, the Ninth Circuit completely disregards the simple fact that ownership of the personal property at issue had vested in the federal government. Ownership vested in two ways: Pursuant to government contract,[14] title passed at the time of the initial progress payment; pursuant to California law, title passed when the personal property was first affixed to the real property. *See, e.g., General Electric Co.* v. *State Board of Equalization,* 244 P.2d at 430.

Any attempt by the Board to tax Howell's possessory interest in personal property—property purchased pursuant to government contracts and for no purpose other than immediate resale to the United States—would require legislative action changing the entire nature of the California Sales and Use Tax. Without such action, the legal incidence of California's use tax on personal property in Howell's possession can only fall upon the United States.

California has simply not drawn its tax statutes and regulations so as to reach the materials and supplies being taxed here without transcending constitutional limits. It is emphasized that Howell's action herein does not in any way challenge California's legal power to revise its use tax in order to impose a possessory use tax on materials used by a federal contractor, but owned by the United States. It does not seek to thwart California's authority to impose a tax on a government contractor, even if that contractor has the ability to pass on the tax to the United States. *See Washington v. United States,* 103 S. Ct. at 1347-48; *United States* v. *New Mexico,* 455 U.S. 720, 734 (1982). It does not attempt to contest California's right to implement a complementary tax system under which a tax is to be collected from a government contractor because the party normally taxed (the United States) is constitutionally immune from such taxation. *See* 455 U.S. at 737-38. Rather, Howell merely seeks a ruling that it cannot be held liable for a use tax

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[14] *See* pp. 10-11 *supra.*

in California when the taxable use incident to ownership is in the hands of the United States. It is that simple.

This Court's decisions, as well as decisions of other federal and state courts, strongly support Howell's position. Consideration of this Court's opinions properly starts with the proposition that—in determining who a state intends will pay the tax—the entire state taxation scheme and the context in which it operates, as well as the express words of the taxing statutes, must be considered. *See, e.g., United States* v. *Tax Commission,* 421 U.S. 599, 609-10 & n.8 (1975); *United States* v. *City of Detroit,* 355 U.S. 466, 469 (1958); *United States v. California State Board of Equalization,* 650 F.2d at 1131. And it is well settled that this Court is not bound by a *state's* conclusion as to where the legal incidence of its taxation scheme will fall. *See, e.g., Diamond National Corp.* v. *State Board of Equalization,* 425 U.S. at 268.

It is equally well established that a determination of legal incidence is not only an inquiry into who is legally obligated to remit the collected tax to the state. *E.g., United States* v. *California State Board of Equalization,* 650 F.2d at 1131. Thus, "the legal incidence of a tax does not necessarily fall on the party who acts as a conduit by forwarding collected taxes to the state." *Id.; United States* v. *Tax Commission,* 421 U.S. at 607.

In the last analysis, if the state taxing statute "all but compels" a party who contracts with the United States to collect the tax from the U.S. Government, then such a tax scheme can be said to manifest an intent that the United States directly pay the tax. *United States* v. *California State Board of Equalization,* 650 F.2d at 1132. *See also First Agricultural National Bank* v. *State Tax Commission,* 392 U.S. 339, 347 (1968); *United States* v. *Tax Commission,* 421 U.S. at 608-09.

Inexplicably, the court of appeals does not even acknowledge that the Board is attempting to tax Howell's *use* of the Government's property. This omission is telling; because to permit California to tax Howell for its use of such property—and not just its possessory interest in that property—the court of appeals would have had to ignore the plain terms of the California use tax statute. The Ninth Circuit simply fails to

address the fact that the Board is attempting to accomplish by indirection that which is expressly prohibited by the Supremacy Clause: the taxing of the United States for Howell's use of materials owned by the Government.

To repeat, the stipulated facts below make clear that Howell had no purpose in purchasing personal property from suppliers other than the eventual resale of that property to the federal government. Since, by definition, Howell's business is contracting with the United States, this resale was "in the regular course of business" pursuant to the statutory scheme. *See* CAL. REV. & TAX. CODE § 6007 (Deering 1975). It was for this reason that resale certificates were provided by Howell to its suppliers.

It is equally clear, however, that the Board could have taxed Howell's suppliers under section 6007.5 regardless of Howell's issuance of resale certificates. This is because section 6007.5 provides that a sale of personal property to a federal contractor also constitutes a sale under the California Revenue and Taxation Code. Why the Board determined to ignore that section and impose an illegal use tax on Howell is left a mystery.

Thus, once the personal property was acquired by Howell, it was obviously not used within the meaning of section 6009—wherein "use" is defined as being "incident to the ownership of that property . . . ." Rather, the use was that of the federal government in which title vested, either after the initial progress payment was made by the United States or at the first instant that Howell attached the personal property to the Government's realty.[15] *See, e.g., Lockheed Aircraft Corp.* v. *State Board of Equalization,* 146 Cal. Rptr. at 292; *Union Oil Co.* v. *State Board of Equalization,* 368 P.2d at 496.

Inasmuch as sections 6007.5 and 6384 impose a tax based on ownership of personal property, the Board's attempt to employ these sections to tax federal contractors for using personal property owned by the United States clearly runs afoul of the Supremacy Clause, for it "all but compels" Howell to collect the use tax from the owner of that property, the United States. *See United States* v. *California State Board of Equalization,* 650 F.2d at 1132. And to the extent that section 6384 is

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[15] *See* pp. 10-11 *supra.*

being employed to tax federal contractors for their "use" of Government-owned property—"either as agents of the United States or for their own account"—that section manifests a clear legislative intent that the United States is to pay the use tax. *See id.*

This conclusion is supported by a series of cases from other jurisdictions. In those cases, taxpayer-contractors acquired and retained possession of personal property which was used in performing contracts under which title had vested in the federal government. *United States* v. *Nevada Tax Commission*, 291 F. Supp. 530 (D. Nev. 1968), *aff'd*, 439 F.2d 435 (9th Cir. 1971); *General Motors Corp.* v. *State Commission of Revenue & Taxation*, 182 Kan. 237, 320 P.2d 807, *cert. denied*, 358 U.S. 875 (1958); *State Tax Commission* v. *Graybar Electric Co.*, 86 Ariz. 253, 344 P.2d 1008 (1959); *Avco Manufacturing Corp.* v. *Connelly*, 145 Conn. 161, 140 A.2d 479 (1958).[16] In each case, the state attempted to tax the tangible personal property under a sales and use tax statute similar to California's. Without exception, the courts held that, since the federal government became the owner, neither the sales nor use tax could be applied. Similarly, under the Board's current application of the California Sales and Use Tax, it is clear that the United States is to bear the direct burden of paying that tax.

2. The Court Of Appeals' Decision Conflicts With Other Federal Decisions On The Same Issue.

The court's decision in *Howell* conflicts squarely with another decision of the Ninth Circuit, *United States* v. *Nevada*

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[16] In *Avco*, for example, the Connecticut Supreme Court of Errors distinguished the possessory use tax at issue in Alabama v. King & Boozer, 314 U.S. 1 (1941) from the title-based use tax involved in that proceeding. The court noted that—while the government contract in King & Boozer provided that title to materials purchased by the contractor vested in the United States upon delivery at the work site and inspection by the Contracting Officer—the Alabama statute "placed less emphasis on the transfer of title than does the Connecticut act." 140 A.2d at 485. The Connecticut use tax is like California's; it is based on ownership, not possession.

Tax Commission,[17] and with a decision by the United States Court of Appeals for the First Circuit, *Federal Reserve Bank* v. *Commissioner of Corporations and Taxation,* 520 F.2d 221 (1st Cir. 1975). In both of these cases, the circuit courts considered substantially the same issue and concluded that—in a state with a title-based use tax—the legal incidence of the use tax does not fall upon the government contractor, but directly upon the United States itself.

With respect to the *Nevada* decision, the court of appeals, without elaboration or even citation to that case, broadly states that all of the cases relied upon by Howell were "inapposite" because "[e]ach of those cases involved the taxation of a direct transaction between the United States and some instrumentality." Pet. App. A, p. 6a *infra.* In straining to reach this unwarranted conclusion, the court of appeals was apparently relying on the Board's wholly-erroneous contention that "none of the property in the *Nevada* case was purchased for use in constructing improvements to real property." Brief for Appellee at 11, *Howell* v. *State Board of Equalization (In re Howell),* 731 F.2d 624 (9th Cir. 1984). The Board also argued below that the Nevada tax scheme—at issue in *Nevada*—was different than California's. These are factually-unsupported arguments, offered up by the Board and accepted without question by the Ninth Circuit, but never substantiated or even explained.

In *Nevada,* contrary to the Board's characterization, the state attempted to tax personal property under sales and use tax statutes virtually identical to those in effect in California. *See* Reply Brief for Appellant at A-1—A-2, *Howell* v. *State Board of Equalization (In re Howell),* 731 F.2d 624 (9th Cir. 1984). Moreover, the district court's decision in *Nevada,* affirmed by the Ninth Circuit, directly undercuts the court of appeals' reasoning in *Howell:* that state taxes can only be struck down as direct taxes if they apply to a direct transaction between the federal contractor and the Government. *See* Pet. App. A, pp. 5a-6a *infra.* In particular, the *Nevada* court held that the state could not impose a use tax on a government contractor who

[17] 291 F.Supp. 530 (D. Nev. 1968), aff'd, 439 F.2d 435 (9th Cir. 1971).

purchased personal property from a supplier because title in that property had vested in the contractor's customer, the United States. *See* 291 F. Supp. at 533-37. While the *Nevada* court noted that the state had the legal power to tax such a transaction, *see United States* v. *Boyd,* it concluded that this power had simply not been exercised. 291 F. Supp. at 533-34.

Similarly, the First Circuit in the *Federal Reserve Bank* case was faced with the imposition of a Massachusetts use tax on government contractors who had purchased building materials and supplies for use in the construction of a new Federal Reserve Bank building. Massachusetts, like California, has a title-based use tax. *See* 520 F.2d at 226.

The First Circuit held that the Massachusetts use tax could not be applied because the legal incidence of that tax fell upon the owner of the personal property—the United States—and not upon the government contractors. In this connection, the court emphasized that, while Massachusetts had the constitutional authority to alter its tax scheme to reach the personal property being used, "[t]he tax is not drafted like those in *Boyd* and the Michigan cases so as to avoid the impermissible incidence." *Id.*

The existing conflict in the decisions within the Ninth Circuit, as well as between the Ninth and First Circuits, is already confusing government contractors who conduct business in states with title-based use taxes. This Court's review is appropriate to preclude the disputes among courts and to clarify the manner in which federal contractors should enter into, and perform, government jobs.

3. The Court Of Appeals' Decision Will Directly Control The Manner In Which Thousands Of Federal Contractors Conduct Their Business.

In ruling that California can impose a use tax on a government contractor with respect to tangible personal property owned by the United States, the Ninth Circuit has displaced the established constitutional principle of the U.S. Government's immunity from state taxation. Under the court's opinion, there is nothing to prevent California, and other states with

similar use tax statutes, from imposing such a tax on federal contractors. To tax federal contractors under these circumstances is to tax the United States itself.

It is readily apparent that California's levy of a use tax on Howell will have a widespread and immediate impact on the United States. This is because the situation presented here is not unique: The imposition of a use tax on government contractors who have no title or ownership interest in personal property will compel those contractors to collect the tax from the United States.

Specifically, the United States is the sole entity to whom many federal contractors are likely to be able to sell their products—especially since those products must meet the special requirements of the federal government. *See, e.g.,* pp. 11-12 *supra.* It is typical, then, for federal contractors like Howell to pass on to the United States all costs related to a particular contract since the specialized property is unlikely to have application to other contracts. For this same reason, the federal contractor's investment cannot be spread out over other projects; the United States will have to shoulder the tax burden.

Accordingly, the *Howell* decision will have a serious and unsettling effect on the business of government contracts. It prevents government contractors from properly allocating construction costs. It adds hidden costs to the contractor's services and the Government's contract price. It threatens the predictability of bidding for, entering into, and performing construction contracts for the United States. And the decision makes federal contractors totally dependent on each state's unrestrained attempt to rectify—arbitrarily—the legislative oversight in failing to tax as a "use" a possessory interest in personal property. *See Federal Reserve Bank* v. *Commissioner of Corporations and Taxation,* 520 F.2d at 226.

In sum, any attempt to tax a federal contractor's possessory interest in personal property requires legislation that so provides. Without appropriate legislative action, the legal incidence of a use tax is a direct tax upon the United States in violation of the Supremacy Clause. The *Howell* decision is not limited to California; it will be relied upon to tax the United States in all states that have title-based use tax statutes.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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September 4, 1984

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS,
NINTH CIRCUIT.

In re EDWARD W.W. HOWELL,
d/b/a HOWELL ELECTRIC COMPANY,
Debtor.

EDWARD W.W. HOWELL,
d/b/a HOWELL ELECTRIC COMPANY,
Debtor/Appellant,

v.

THE STATE BOARD OF EQUALIZATION,
Claimant/Appellee.

No. 83-2124.

Argued and Submitted March 13, 1984.

Decided April 19, 1984.

* * * *

Before HUG and FERGUSON, Circuit Judges, and BYRNE*, District Judge.

FERGUSON, Circuit Judge:

On February 12, 1979, Edward W.W. Howell, d/b/a Howell Electric Company ("Howell"), filed a petition for reorganization under Chapter 11 of the Bankruptcy Act, 11 U.S.C. § 1101 *et seq.* On June 22, 1979, the California State Board of Equalization ("Board") filed a priority claim in the proceeding for sales and use tax. The bankruptcy court disallowed the Board's claim, ruling that the California Sales and Use Tax impermissibly discriminated against contractors

*Hon. Wm. Matthew Byrne, Jr., United States District Judge, Central District of California, sitting by designation.

doing business with the United States Government, and thus was unenforceable. The Board appealed this decision to the district court. The district court reversed, finding that no unconstitutional discrimination against federal contractors existed, and Howell appeals. We affirm the district court.

Background

The taxes in dispute are those which the Board claims are due pursuant to Sales and Use Tax Regulation No. 1521, Cal.Admin, Code tit. 18, R. 1521. This regulation governs the taxation of construction contractors. The regulation distinguishes between three types of tangible personal property typically used or installed on a construction project—materials, fixtures, and machinery and equipment. Under the regulation, both United States and private contractors are treated as retailers of machinery and equipment and as consumers of materials. With respect to fixtures, however, the regulation provides for dissimilar treatment of United States and private contractors. United States contractors are classified as consumers of fixtures, and therefore the tax applies to the sale of the fixtures from the supplier to the contractor. Private contractors, on the other hand, are classified as retailers of fixtures; thus, the tax applies to the transfer of fixtures to the project owner rather than to the sale of the fixtures to the contractor. Howell claimed below that this distinction impermissibly discriminates against federal contractors. The bankruptcy court agreed, and additionally ruled that the regulation's taxation of materials also discriminated against federal contractors because nonfederal contractors could reimburse themselves for the tax they were charged on materials by adding the tax to the overall cost passed on to the owner, whereas the federal contractor could not compel the federal government to pay the amount representing the sales tax.

The district court reversed the bankruptcy court's ruling as to the tax on materials, holding that, contrary to the bankruptcy court's conclusion, a federal contractor could constitutionally pass on the materials tax to the United States as part of its overall costs of performance, just as a non-federal contractor could pass on the tax to its project owner, and thus there was no

impermissible discrimination. The district court also reversed the bankruptcy court's ruling as to the tax on fixtures, holding that the California fixtures tax did not place a heavier economic burden on the federal contractor than that borne by a similarly situated nonfederal contractor.

On appeal to this court, Howell advances new grounds to support its contention that the California Sales and Use Tax scheme is unconstitutional: (1) the California tax impermissibly levies a direct tax upon the United States Government;[1] (2) the State Board of Equalization exceeded its statutory authority in adopting a regulation which makes federal contractors "consumers" of tangible personal property that is ultimately resold to the United States; and (3) the California tax impermissibly discriminates between those contractors who sell tangible personal property to the United States in the course of performing construction contracts and those contractors who sell tangible personal property to the United States without installing it.

ANALYSIS

1. *Scope of Review*

The Board contends that Howell has abandoned the position taken before both the bankruptcy court and the district court and, therefore, there are no issues properly presented for appellate review. In most circumstances, a federal appellate court will not consider an issue not passed upon below. *Singleton v. Wulff*, 428 U.S. 106, 120, 96 S.Ct. 2868, 2877, 49 L.Ed.2d 826 (1976); *Helm v. California*, 722 F.2d 507, 510 (9th Cir.1983). However, the rule of waiver is one of discretion rather than jurisdiction, and the Ninth Circuit recognizes an exception under which an appellate court will review an issue not previously raised in the district court. *Telco Leasing, Inc. v. Transwestern Title Co.*, 630 F.2d 691, 693 (9th Cir.1980). The court will consider an issue conceded or neglected below if the

[1] Howell referred to this issue in its pretrial statement before the bankruptcy court, but it was not argued before either the bankruptcy court or the district court.

issue is purely one of law and the pertinent record has been fully developed. *United States v. Patrin,* 575 F.2d 708, 712 (9th Cir.1978). The rule of waiver may also be relaxed when there are significant questions of general impact or when injustice might otherwise result. *Krause v. Sacramento Inn,* 479 F.2d 988, 989 (9th Cir.1973).

The issue presented to us for review—the constitutionality of the California Sales and Use Tax as applied to federal contractors—is a question of law. Additionally, the decisions of both the bankruptcy court and the district court were based primarily on a stipulation of facts between the parties and the pertinent record on the issues raised by Howell is fully developed. We thus exercise our discretion to reach the issues raised by Howell on appeal.

2. *Does the California Sales and Use Tax Levy a Direct Tax upon the United States Government?*

Howell's position before the bankruptcy court and the district court that the California Sales and Use Tax impermissibly discriminated against federal contractors became untenable in light of the Supreme Court's recent decision in *Washington v. United States,* ____ U.S. ____, 103 S.Ct. 1344, 75 L.Ed.2d 364 (1983). In *Washington,* a state statute imposed a sales tax on the sale of materials to federal contractors, but with regard to nonfederal construction projects, the tax was imposed on the project owner. *Id.* at 1347. The United States argued that the statutory scheme discriminated against federal contractors in violation of the Supremacy Clause. *Id.* The Supreme Court rejected the United States' position, holding that the tax was not discriminatory with regard to the economic burdens that resulted, because federal contractors could pass the tax on to the federal government when they set their price. *Id.* at 1348 n. 4. The Court held that it was sufficient that federal contractors had the opportunity to pass on the tax to the United States; it was not required that they actually do so. *Id.* at 1349.

Faced with the result in *Washington*, Howell retreated from the position taken in the lower courts and now claims that the California Sales and Use Tax is unconstitutional because it levies a direct tax upon the United States. This contention, however, has been consistently rejected by the Supreme Court and this circuit. The Supreme Court implicitly approved the constitutionality of a federal contractor "passing on" the tax to the United States in the reasoning of *Washington*, *see* 103 S.Ct. at 1348 n. 4, and has expressly upheld its constitutionality in many cases. *See United States v. New Mexico*, 455 U.S. 720, 734, 102 S.Ct. 1373, 1382, 71 L.Ed.2d 580 (1982) ("immunity may not be conferred simply because the tax has an effect on the United States, or even because the Federal Government shoulders the entire economic burden of the levy. . . . The Government's right to be free from state taxation 'does not spell immunity from paying the added costs, attributable to the taxation of those who furnish supplies to the Government and who have been granted no tax immunity.' ") (quoting *Alabama v. King & Boozer*, 314 U.S. 1, 9, 62 S.Ct. 43, 45, 86 L.Ed. 3 (1941)); *United States v. Boyd*, 378 U.S. 39, 44, 84 S.Ct. 1518, 1521, 12 L.Ed.2d 713 (1964) ("The Constitution . . . does not forbid a tax whose legal incidence is upon a contractor doing business with the United States, even though the economic burden of the tax, by contract or otherwise, is ultimately borne by the United States."). *See also United States v. California State Board of Equalization*, 650 F.2d 1127, 1131 (9th Cir. 1981) ("The constitution only prohibits the state from levying a tax on the United States; it does not prohibit the state from enacting a taxing scheme whose effect is to increase prices paid by the United States."), *aff'd*, 456 U.S. 901, 102 S.Ct. 1744, 72 L.Ed.2d 157 (1982).

The cases cited by Howell [2] to demonstrate instances in which taxes have been struck down as direct taxes on the

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[2] *Diamond National v. State Board of Equalization*, 425 U.S. 268, 96 S.Ct. 1530, 47 L.Ed.2d 780 (1976); *United States v. California State Board of Equalization*, 650 F.2d 1127 (9th Cir. 1981), *aff'd*, 456 U.S. 901, 102 S.Ct. 1744, 72 L.Ed.2d 157 (1982); *United States v. State Board of Equalization*, 536 F.2d 294 (9th Cir. 1976).

United States are inapposite. Each of those cases involved the taxation of a direct transaction between the United States and some instrumentality. In each instance, the court found that the "legal incidence" of the tax fell upon the United States and thus was impermissible. Here, the transaction between Howell and the United States is not taxed at all; the tax is imposed on the transfer of property from a supplier to Howell. Thus, even if Howell is correct in its assertion that the legal incidence of the tax falls on the vendee rather than the vendor in the taxed transaction, the implication of its argument is that the legal incidence falls on Howell rather than on the supplier, *not* that the legal incidence falls on the United States.[3]

3. *Is There Statutory Authorization for Treating Federal Contractors as Consumers of Fixtures?*

Howell contends that Regulation 1521, which classifies federal contractors as consumers of materials and fixtures, is an invalid regulation because there is no statutory authority for classifying a federal contractor as a consumer. We find this argument to be without merit. There are two sections of the California Revenue and Taxation Code which provide for taxation of United States contractors. Section 6007.5 provides:

> A sale of tangible personal property to a contractor or subcontractor for use in the performance of contracts with the United States for the construction of improvements on or to real property in this State is a retail sale. The gross receipts from such a sale or the sales price of property so sold shall be included in the measure of the taxes imposed by this part.

Section 6384 provides:

> Notwithstanding any other provision of law, the tax imposed under this part shall apply to the gross receipts from the sale of any tangible personal property to contractors

[3] Thus, it is not necessary to resolve the issue whether state or federal law governs this determination. The federal cases cited by Howell do not support its contention.

> purchasing such property either as the agents of the United States or for their own account and subsequent resale to the United States for use in the performance of contracts with the United States for the construction of improvements on or to real property in this state.

Thus, whether the sale between a supplier and a federal contractor is one in which the property will first be resold to the United States and then used in the performance of a contract, or first incorporated into the project and then sold as a "package" to the United States, the California statutory scheme taxes the transaction between the supplier and the federal contractor as a retail sale. Therefore, the classification of the federal contractor in Regulation 1521 as a "consumer" in such a retail transaction is not inconsistent with the statute. And, as pointed out by the Board, since the regulation accurately describes the tax consequences of the California Sales and Use Tax, the particular word chosen to describe the contractor is immaterial.

4. *Is There a Rational Basis for Distinguishing Between Contractors Who "Sell" Tangible Personal Property to the United States in the Course of Performing a Construction Contract and Those Who Transfer Similar Property Without Attaching It to Realty?*

Howell finally argues that there is no rational basis for distinguishing between United States contractors who make improvements to real property and those who simply transfer property to the United States without attaching it to realty. The State, however, has broad discretion in making classifications in a system of taxation. "Where taxation is concerned and no specific federal right, apart from equal protection, is imperiled, the States have large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation." *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 359, 93 S.Ct. 1001, 1003, 35 L.Ed.2d 351 (1973) (footnote omitted). The fact that use in a construction project changes the form of property otherwise sold on an outright item-by-item basis provides a rational basis for the state to distinguish between the two types of transfers.

CONCLUSION

The California Sales and Use Tax, as applied to federal contractors, does not levy a direct tax upon the United States. Further, Regulation 1521 is not inconsistent with the California statutory scheme and does not impermissibly discriminate between contractors who make improvements to real property and those who transfer similar property without attaching it to realty. The district court is AFFIRMED.

APPENDIX B

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

Civil No. C 81-4504 SW

Bankruptcy No. 4-79-0344-W

In re EDWARD W. W. HOWELL
d/b/a HOWELL ELECTRIC COMPANY,

Debtor.

EDWARD W. W. HOWELL,
d/b/a HOWELL ELECTRIC COMPANY,

Debtor-Appellee,

v.

STATE OF CALIFORNIA BOARD OF EQUALIZATION,

Claimant-Appellant.

MEMORANDUM AND ORDER REVERSING BANKRUPTCY COURT RULING

This case is before the court on appeal from a September 23, 1981 ruling of the Bankruptcy Court disallowing Claim No. 33 against debtor Edward W. W. Howell, dba Howell Electric Company ("Howell"). The claimant-appellant, the State of California Board of Equalization, sought review of the decision, contesting the lower court's invalidation of California's Sales and Use Tax Law as applied to federal contractors. After hearing oral argument on March 2, 1982, and considering the extensive briefs filed by the parties, the record on appeal and correspondence from the parties discussing recent case law developments, it is hereby ordered that the Bankruptcy Court's ruling is REVERSED.

Howell, an electrical contractor, challenged the constitutionality of the State's sales and use tax on work he performed as a contractor to agencies of the United States Government. The Bankruptcy Court found that California's taxation of both "materials" and "fixtures" used in construction projects impermissibly discriminates against contractors doing business with the Federal Government, and disallowed the claimed taxes on Supremacy Clause grounds.

State taxes directly on the Federal Government are clearly forbidden under *McCulloch v. Maryland,* 4 Wheat. (17 U.S.) 316 (1819). The states are similarly precluded, under the Supremacy Clause, from discriminatory taxation of private parties doing business with the Federal Government. *See, e.g., Phillips Chemical Co. v. Dumas Independent School District,* 361 U.S. 376, 383 (1960). The states are not barred, however, from taxing those who deal with the Federal Government, "so long as the tax is imposed equally on the other similarly situated constituents of the State." *United States v. County of Fresno,* 429 U.S. 452, 462 (1976). A tax is not invalid merely because it treats those dealing with the Federal Government differently than others; the test is whether the actual tax burden borne by a party dealing with the Federal Government is heavier than that felt by a similarly situated party doing business with a private project owner. *Washington v. United States,* 43 CCH S.Ct. Bull. P. B1627, B1635 (1983).

The Tax on Materials

California defines both federal and non-federal contractors as "consumers" of materials.[1] Cal. Admin. Code tit. 18, R. 1521(b)(1)(A), -(b)(2)(A) (1979). Under this scheme, the taxable sale of materials that ultimately go into a construction project takes place between the supplier of the materials and the contractor. Federal and non-federal contractors appear to

[1] "Materials" are defined under regulation 1521 as tangible personal property which, when combined with other tangible personal property in a construction project, loses its identity and becomes an "integral and inseparable part of the real property." Cal Admin. Code tit. 18, R. 1521(a)(4) (1979).

be treated equally under this arrangement. Nonetheless, the Bankruptcy Court found the materials tax to effectively discriminate against federal contractors, on the ground that federal contractors cannot constitutionally "compel" reimbursement from the Federal Government for this tax, while non-federal contractors can obtain such reimbursement from their project owners.

However, as the Supreme Court recently noted, "the [Federal] Government's right to be free from state taxation 'does not spell immunity from paying the added costs, attributable to the taxation of those who furnish supplies to the Government and who have been granted no tax immunity.' " *United States v. New Mexico,* 455 U.S. 720, 734 (1982) (quoting *Alabama v. King & Boozer,* 314 U.S. 1, 9 (1941)). A federal contractor may thus constitutionally "pass on" to the Federal Government California's materials tax as part of its overall costs of performance under the contract, just as a non-federal contractor might with its project owner. Because both types of contractors may pass through this materials tax to the project owners, the federal contractor is not discriminated against vis-a-vis non-federal contractors. Because the tax is in fact imposed equally on other similarly situated constituents of the State, the tax does not violate the Supremacy Clause. *Fresno* at 462.

The Bankruptcy Court's reliance on *Kern-Limerick, Inc. v. Scurlock,* 347 U.S. 110 (1954), holding unconstitutional a tax on federal contractors who act as purchasing agents of the Federal Government, is also inapposite. In *Kern-Limerick* it was "clear that the Government is the disclosed purchaser," not the contractor, *id.* at 120-21, and thus the tax was held to fall squarely upon an agent of the Federal Government. The Supreme Court has since explained that a finding of constitutional tax immunity "requires something more than the invocation of traditional agency notions . . . a private taxpayer must actually 'stand in the Government's shoes' [citations omitted]." *New Mexico* at 736. In the instant case, there is no firm basis upon which to rest even a finding of "traditional agency," much less a finding so explicit as that of *Kern-*

Limerick or so complete as required by *New Mexico.*[2] California's tax on materials sold to federal contractors, therefore, does not violate the Supremacy Clause.

The Tax on Fixtures

California distinguishes between federal and non-federal contractors regarding the taxation of fixtures.[3] Non-federal contractors are defined to be retailers of fixtures to a project owner, whereas federal contractors are considered as consumers of fixtures. Cal. Admin. Code tit. 18, R. 1521(b)(1)(A), -(b)(2)(B). By making federal contractors consumers, rather than retailers selling to the federal government, the State avoids laying a tax directly on the Federal Government, yet manages to collect a sales tax on the fixtures by taxing their sale *to* the federal contractor. The Bankruptcy Court viewed such differential treatment accorded federal contractors as unconstitutionally discriminatory against those doing business with the Federal Government, and thus disallowed the Board's claims against Howell for the fixtures tax on work Howell performed for the Federal Government. The issue framed upon appeal is whether the California fixtures tax does in fact discriminate against federal contractors. Howell contends that because federal contractors must pay a sales tax to their suppliers of fixtures, while in non-federal projects the contractor is not so burdened (since the non-federal project owner pays the sales tax), the tax is discriminatory.

The Supreme Court has recently addressed a very similar question, in *Washington v. United States,* 43 CHH S.Ct. Bull. P. B1627 (1983). The State of Washington defines non-federal contractors as retailers for sales tax purposes, but treats federal contractors as consumers of the tangible personal property used in a project. Wash. Rev. Code § 82.04.190 (1981). Like California's fixtures tax, this scheme avoids a direct tax on the

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[2] The only evidence of an agency relationship cited to this court consists of the bidding instructions for the federal contract, which provided that sales taxes were to be excluded in preparing the bids.

[3] "Fixtures" under Regulation 1521 are tangible personal property which are accessory to a structure, and which do not lose their identity when installed. Cal. Admin. Code tit. 18, R. 1521(a)(5).

Federal Government, yet allows the state to collect a sales tax on the sale of tangible personal property by a supplier to a contractor.[4] The Supreme Court upheld the tax, stating that the "important consideration. . . is not whether the State differentiates in determining what entity shall bear the legal incidence of the tax, but whether the tax is discriminatory with regard to the economic burdens that result." *Id.* at B1636. Thus a tax scheme does not unconstitutionally discriminate between federal and non-federal contractors merely by varying the route by which the tax arrives at the respective contractors' doorsteps; the relevant question is whether a different form of taxation forces the federal contractor to actually shoulder "a cost he would not have to bear if he were to do the same work for a private party." *Id.* at B1633 n.4.

Simply stated, the test for discrimination is whether the tax as a whole "treats someone else better" than it treats a similarly situated federal contractor. *Id.* at B1636. *See also Fresno*, 429 U.S. at 462. Given two construction projects identical except for the fact that the Federal Government owns one of the projects and a private party owns the other, simple mathematics indicates that a fixed tax on equal quantities of fixtures will result in an identical total economic burden on each of the projects. It is this total burden which is shared by the contractor and the project owner. In both the federal and non-federal situations, the relative bargaining strength of the parties to the contract determines the actual allocation of the burden of the sales tax. In both types of projects the tax will be taken into account by the contractor in setting its price. The only difference between the two situations is that the federal contractor will incorporate whatever portion of the sales tax it is economically capable of passing along into the price it charges the Government, whereas the price set by the non-federal contractor will reflect a reduction for whatever portion of the

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[4] Unlike California, Washington makes the consumer/retailer distinction with regard to all tangible personal property that goes into a construction project, not just fixtures. This difference does not affect the applicability of *Washington* to the instant case. Moreover, while this court acknowledges several other superficial distinctions between the challenged California tax scheme and the statutes upheld in *Washington*, none alter the basic identity of the two systems of taxation.

tax it is incapable of leaving on the project owner. *Washington* at B1633 n.4. The result is that both the federal *and* non-federal contractor will share, to a similar extent in similar situations, the burden of the sales tax with the project owner. Although the incidence of the tax is on a different, earlier transaction in the case of a federal project, the economic burden on the federal contractor will be no more than that borne by a similarly situated non-federal contractor.[5]

Therefore, like Washington, California "has not singled out contractors who work for the United States for discriminatory treatment." *Id.* at B1637. Rather, "[i]t has merely accomodated for the fact that it may not impose a tax directly on the United States as the project owner." *Id.* Under the *Washington* test, California's taxation of fixtures sold to federal contractors is not unconstitutional.

For the foregoing reasons, the decision of the Bankruptcy Court disallowing the Board's Claim No. 66 is REVERSED, both as to the tax on materials and fixtures. The case is REMANDED for further proceedings consistent with this opinion.

IT IS SO ORDERED.

SPENCER WILLIAMS

United States District Judge

DATED: 5/26/83

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[5] *United States v. California State Board of Equalization*, 650 F.2d 1127 (9th Cir. 1981), *aff'd per curiam*, 102 S.Ct. 1744 (1982), cited by Howell, does not deal with the issue presented by the instant case. *State Board of Equalization* addressed the issue of whether, and when, the *legal incidence* of a tax on a transaction to which the Federal Government is a party may properly be said to fall directly upon the Federal Government. The issue herein is whether a tax with legal incidence upon a transaction between a supplier of fixtures and a federal contractor discriminates against federal contractors, where a tax identical in form is not placed upon such transactions involving non-federal contractors. The test here "is not whether the State differentiates in determining what entity shall bear the legal incidence of the tax, but whether the tax is discriminatory with regard to the economic burdens that result." *Washington* at B1636.

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

Civil No. C 81-4504 SW

Bankruptcy No. 4-79-0344-W

MODIFICATION OF FINAL ORDER REVERSING BANKRUPTCY COURT

In re EDWARD W.W. HOWELL,
d/b/a HOWELL ELECTRIC COMPANY,

Debtor.

EDWARD W.W. HOWELL,
d/b/a HOWELL ELECTRIC COMPANY,

Debtor-Appeliee,

v.

STATE OF CALIFORNIA BOARD OF EQUALIZATION,

Claimant-Appellant.

ORDER MODIFYING FINAL ORDER REVERSING BANKRUPTCY COURT

For good cause shown, IT IS HEREBY ORDERED that footnote 2 at page 8, lines 8-11, are hereby deleted from this Court's order filed May 26, 1983. The opinion is modified to read:

[2] There was no evidence in the record to support the apparent misimpression of the bankruptcy court that the instructions under which Howell was to bid for federal contracts, required Howell not include any sales or use taxes in the contract price.

IT IS SO ORDERED.

SPENCER WILLIAMS

United States District Judge

DATED: JUN 17 1983

APPENDIX C

UNITED STATES BANKRUPTCY COURT

NORTHERN DISTRICT OF CALIFORNIA

No. 4-79-0344-W

In re EDWARD W.W. HOWELL,
d/b/a HOWELL ELECTRIC COMPANY,

Debtor.

RULING ON DEBTOR'S OBJECTION TO CLAIM NO. 66—STATE BOARD OF EQUALIZATION

The objection of the debtor to claim no. 66 in this case filed by the Board of Equalization of the State of California, was heard on August 26th, 1980, GEORGE DEUKMEJIAN, Attorney General by PATRICIA STRELOFF, Esq., Deputy Attorney General, appearing for the State Board, and JOEL T. GUTHRIE, Esq. appearing for debtor. Each party presented evidence consisting of a stipulation of facts, the testimony of witnesses, and documents. The questions presented have been extensively briefed by the parties in pretrial and post-trial memoranda.

Debtor, an electrical contractor, performed work as a contractor or subcontractor pursuant to several contracts with agencies of the United States Government during the period April 1, 1976, to February 12, 1979. Each contract involved the performance of work and installation of materials and fixtures on property owned or controlled by an agency of the United States Government. As to each such contract, the bidding instructions required that the contractor not include any California Sales or Use Taxes. Debtor in its bid did not include any amount for such taxes. Upon audit and re-audit, the State Board claims Sales and Use Taxes are due from debtor in the total amount of $60,661.00 for the period in question.

Debtor has stipulated that the sum of $24,790.00 assessed as Sales or Use Taxes upon materials used in the jobs is payable and the State Board's claim should be allowed in said amount. The balance of the claim is disputed upon the ground that the California Sales and Use Tax scheme sought to be enforced by the State Board is unconstitutional in that it impermissibly discriminates against U.S. contractors such as debtor. The provisions involved are § 6051 et seq and § 6201 et seq of the California Sales and Use Tax Law imposing a tax upon sellers who make retail sales and users ("storage use or other consumption") of tangible personal property purchased from any retailer, and § 1521 of the California Administrative Code.

Since this matter came under submission, the court's law clerk has expended extensive time in researching the law surrounding intergovernmental taxation. The issue herein is one of great complexity arising out of the necessarily arbitrary definitions and principles peculiar to the area of taxation. Because of the sensitive nature of interaction between the federal and state governments and the need for both to raise sufficient revenues from taxes levied on invariably the same pockets, the bar against state taxation of federal functions posed by the supremacy clause has produced a lengthy history of cases not readily reconcilable with each other.

The case of *United States v. State of Washington,* No. 78-1424 ____ F.2d ____ (C.9, 1980), was brought to this court's attention as presenting substantially the same issue as that in the instant case, albeit involving sales tax provisions of the State of Washington. This case has been pending before the Ninth Circuit since May 1980. On August 24, 1981, the court in an opinion by Judge William Matthew Byrne, Jr., District Judge for the Central District of California, sitting by designation, handed down its decision distilling the following principle which this court holds to be controlling in the instant case: "A tax may be imposed upon those who deal with the federal government only if the burden of the tax is equally felt by those 'similarly situated' who do not deal with the federal government."

In 1975, Washington sales tax code provisions, the effect of which theretofore had made the owner of real property improvements liable as a consumer for sales tax on personal property incorporated therein to be collected and remitted to the state by the prime contractor as retailer, were amended in such a manner as to cause U.S. prime contractors to be treated as the consumer of personal property incorporated into federal real property improvements. Non-U.S. contractors continued to be treated as retailers, having no personal liability for the sales tax but having an obligation to collect the tax from the improvement owner and remit it to the state. The effect of the 1974 amendments was to force a U.S. prime contractor to pay out-of-pocket the amount of the tax if it could not compel reimbursement from the federal government.

Like the State of California in the instant case, the State of Washington relied principally on *United States v. County of Fresno,* 429 U.S. 452 (1977), and *United States v. City of Detroit,* 355 U.S. 466 (1958), in which the U. S. Supreme Court declared that renters (*Fresno*) and users (*Detroit*) of tax-exempt property could contitutionally be taxed to the same extent as were owners of non-exempt real property who passed the tax on to their lessees. The court adopts the Ninth Circuit's discussion of those cases as applicable in the instant case.

The opinion rejects the State of Washington's attempt to draw a parallel between the position of renters/users in the above cases and that of U.S. prime contractors required by the challenged statutes to pay sales taxes otherwise imposed on owners of non-federal real property improvements. The statutory class of "consumers" was an artificial one composed of taxpayers not similarly situated, namely, U.S. prime contractors and owners of non-federal real property improvements. Furthermore, the tax scheme placed a financial burden only on U.S. prime contractors, not on non-U.S. prime contractors as well, so that the political check against abusive taxation or interference with federal functions did not exist. (See *M'Culloch v. Maryland* (1819) 4 Wheaton 316.) Finally, any attempt to equalize the tax burden as between the U.S. and private real property improvement owners is barred by the

supremacy clause, whether the means thereto be a direct tax on the U.S. or a discriminatory tax on those who deal with the United States.

In view of the foregoing discussion, it follows that the California Sales and Use Tax is unconstitutionally discriminatory as levied on U.S. contractors if it forces the U.S. contractor to go out-of-pocket in the amount of the sales tax while at the same time the non-U.S. contractor is not compelled to go out-of-pocket in that amount. Based on the following review of the California Sales and Use Tax Law as implemented by specific regulations, the court finds the tax unconstitutionally discriminatory and void with respect to U.S. contractors.

Preliminarily, the state's briefs cited *C.R. Fedrick, Inc. v. State Board of Equalization* 120 Cal. Rptr. 434 (1974) for the proposition that the state has the power to tax U.S. contractors differentially. However, in matters of taxation where a federal right is concerned, the characterization given to a state tax by state courts or legislatures is not binding on a federal court, nor does such characterization relieve a federal court from the duty of considering the real nature of the tax and its effect upon the federal right asserted. *Carpenter v. Shaw* 280 U.S. 363 (1929), at 367 and 368.

When a discriminatory tax is alleged, such that it is necessary to determine how other taxpayers similarly situated are treated, an examination of the entire tax structure is required if the provision imposing the tax does not sufficiently reveal such treatment. *Phillips Co. v. Dumas School District* 361 U.S. 376 (1960), at 383. It is the net effect of tax provisions and regulations that determines the question of discriminatory taxation rather than solely the explicit language of specific provisions and regulations.

§ 6007 of the California Revenue and Taxation Code defines a retail sale as one for any purpose other than resale in the regular course of business. Without more, any contractor who buys materials and other tangible personal property for resale by incorporation into real property improvements pas-

sing on the cost thereof to the ultimate owner can be a person engaged in the resale of goods in the regular course of business on whom no tax liability falls.

Former § 6052, at all times relevant to this case, reads: "The tax hereby imposed shall be collected by the retailer from the consumer insofar as it can be done." Since the decision in *Western Lithograph Co. v. State Board of Equalization* 11 C. 2d 156 (1934), at 162, former § 6052 has been construed as a vendor tax which the vendor could, but had no mandatory duty to, pass on to the purchaser. Under former § 6052 and present § 6207, the retailer who holds out directly or indirectly that he will absorb the sales or use tax or any part of it is guilty of a misdemeanor. Reading those provisions together, the California courts for forty years or more have deemed former § 6052 to "permit" the non-U.S. to reimburse itself by charging the owner an additional amount representing tax for remittance to the state, but at the same time to forbid the U.S. contractor to attempt to collect the same amount from the federal agency because of the constitutional prohibition against a direct tax on the United States.

Since a U.S. contractor is forbidden to collect the sales tax from the federal agency under former § 6052, the state appears to "lose" a fair amount of sales tax revenue. To reduce the perceived loss, the legislature enacted § 6007.5 which states in pertinent part: "A sale of tangible personal property to a property . . . is use in the performance of a contract with the United States for the construction of improvements on or to real property . . . is a retail sale." The effect of § 6007.5 is to require the supplier of materials and personal property to a U.S. contractor who intends to use those items in improving federal real property to collect the sales tax from the U.S. contractor prior to transfer and incorporation of those items into the federal improvement.

Up to this point, the effect of the California tax provisions appears to be remarkably like that of the amended Washington State tax provisions that Judge Byrne found constitutionally impermissible with respect to federal contractors in that state. A further examination of the regulations regarding the Califor-

nia statutory provisions does nothing but confirm the discriminatory effect of the California sales tax structure as a whole with regard to U.S. contractors.

Although § 6007.5 refers only to U.S. contractors, regulation 1521 was promulgated to implement that and other related sales and use tax provisions concerning all contractors. Regulation 1521 divides tangible personal property used in real property improvement construction into three categories destined for different tax treatment: machinery or equipment, materials and fixtures.

On the face of it, Regulation 1521 appears to treat all contractors identically with respect to the first and second categories, that is, machinery or equipment and materials. It provides that all contractors are retailers of machinery or equipment. Logically, non-U.S. contractors are retailers because § 6007.5 by its terms applies only to U.S. contractors. As retailers, notwithstanding the construction of § 6052 in *Western Lithograph,* non-U.S. contractors are compelled by former § 6053 and present § 6207, the misdemeanor sections, to collect the sales tax thereon from the owner of the improvement for remittance to the state—literally to pass on the sales tax. On the other hand, U.S. contractors are effectively made retailers of machinery or equipment by dint of § 6381 which provides an exemption from the sales tax for sales of goods of that category to the U.S. government. Thus, as retailers of machinery or equipment, but for utterly different reasons, U.S. and non-U.S. contractors are not liable out of their own pockets for payment of the sales tax to their suppliers for remittance to the state.

With respect to the category called "materials" Regulation 1521 appears to accord all contractors equal treatment by requiring their suppliers to collect the sales tax from them regardless of the nature of the owner of the real property improvement. But the appearance of equal treatment is only that. Whereas non-U.S. contractors may reimburse themselves by adding the amount of the tax to the overall cost passed on to the owner of the real property improvements, the U.S. contractor may not compel the federal agency to pay the amount representing the sales tax.

Counsel for the state in her brief and in oral argument maintains that the regulation concerning materials merely reflects business reality in that U.S. contractors add on the amount of the sales tax and charge the federal agency that amount even if they do not explicitly separate that cost item out of the bid presented to the federal government. Since the time of *Alabama v. King & Boozer* 314 U. S. 1 (1941), it has been thought the federal government constitutionally can permit itself to be taxed by the state concerning such contracts for construction. However, in *Kern-Limerick, Inc. v. Scurlock* 347 U.S. 110 (1954) the U.S. Supreme Court held that if the prime contract made the contractor a purchasing agent for the government then no state sales tax could be levied on the contractor because the real purchaser under the contract is the federal government.

In general, today, federal contracting has taken on the business terms found in *Kern-Limerick, Inc.* The uncontroverted testimony in this case was that the contracts to which HOWELL was party were let with instructions to the effect that all sales taxes were to be excluded in making up the bid.

HOWELL and similarly situated U.S. contractors cannot compel the federal agency to reimburse them for the cost of the sales tax. Under the tax provisions and regulations, nevertheless, HOWELL and others similarly situated must pay the tax to the state. The business reality of which counsel for the state spoke does not obtain in this case. Nor do the tax provisions and regulations provide for differentiating between sales pursuant to *King and Boozer* contracts as opposed to *Kern-Limerick* contracts to prevent forcing a U.S. contractor out-of-pocket.

Under the Ninth Circuit decision in *U.S. v. State of Washington* it is constitutionally impermissible under the supremacy clause to levy a tax that places a greater burden on one who deals with the federal government than it does on one similarly situated who does not deal with the federal government. The California sales tax as applied to transfers of materials to be incorporated into federal real property improvements is void under this rule of law notwithstanding the fact

that terms of the regulation concerning materials appear to accord equal treatment to U.S. and non U.S. contractors.

With respect to the third category of tangible personal property in construction contracts, Regulation 1521 in bald terms declares U. S. contractors consumers of fixtures and non-U. S. contractors retailers thereof, openly stating the intended difference in tax treatment of similarly situated taxpayers who differ only as regards the nature of the entity with which they deal. Like § 6007.5, this regulation on its face provides for different treatment that in reality results in disparate and disadvantageous treatment of one who deals with the federal government and is therefore void.

In summary, the court disallows the claimed taxes upon fixtures and materials upon the ground that the taxing scheme is impermissibly discriminatory as to U. S. Government contractors such as debtor herein. Notwithstanding the stipulation, the court does not allow the sales and use taxes assessed upon materials for the reason that under the case of *U.S. v. State of Washington* which the court deems controlling, the taxes assessed are discriminatory and entirely void. Federal courts have no authority to recognize such a tax. *Moses Lake Homes v. Grant County* (1960) 365 U.S. 744. Further, in passing upon a claim the court is not bound by a stipulation of debtor who is not acting in his own behalf in this instance but on behalf of creditors upon whom the loss would fall if the claim is improperly allowed. Such stipulations are subject to review and approval or disapproval by the court. It follows that the claim of the State Board should be disallowed in toto. In view of the foregoing findings and conclusions, it is not necessary to determine whether the items questioned are equipment or fixtures.

IT IS ORDERED that claim no. 66 is disallowed.

CAMERON W. WOLFE

Cameron W. Wolfe
Bankruptcy Judge

Dated: September 23, 1981

APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 83-2124
C-81-4504-SW, 4-79-0344-SW

In re: EDWARD W.W. HOWELL,
d/b/a HOWELL ELECTRIC CO.,

Debtor.

EDWARD W.W. HOWELL,
d/b/a HOWELL ELECTRIC CO.,

Debtor/Appellant,

vs.

THE STATE BOARD OF EQUALIZATION,

Claimant/Appellee.

Judgment

APPEAL from the United States District Court for the Northern District of California

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered April 19, 1984

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 83-2124

DC No. C 81-4504 SW

In re: EDWARD W.W. HOWELL,
d/b/a HOWELL ELECTRIC COMPANY,

Debtor.

EDWARD W.W. HOWELL,
d/b/a HOWELL ELECTRIC COMPANY,

Debtor/Appellant,

v.

THE STATE BOARD OF EQUALIZATION,

Claimant/Appellee.

ORDER

Before: HUG and FERGUSON, Circuit Judges, and BYRNE*, District Judge

The petition for rehearing is denied.

Filed June 4, 1984

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*Hon. Wm. Matthew Byrne, Jr., United States District Judge, Central District of California, sitting by designation.